RECENT CASES

COMMON CARRIERS—WHERE FILED TARIFF DOES NOT SO PROVIDE CARRIER CANNOT LIMIT ITS LIABILITY FOR LOSS BY RAISING DEFENSE OF ESTOPPEL BASED ON SHIPPER'S CHOICE OF RELEASED RATE

Plaintiff's agent tendered to defendant express company's driver for interstate shipment an unmarked, fifty-pound package containing platinum worth $56,000. The driver was informed as to the nature but not the value of the contents; when he inquired what value would be declared, the shipper replied "fifty dollars." A receipt was made out noting both the contents and the fifty-dollar valuation,[1] and shipper paid only the released rate[2]—based on liability limited to the declared value—applicable to ordinary merchandise.[3] This was in violation of defendant's filed tariff which required that precious metals be shipped only at actual value.[4] The package never reached its destination, and plaintiff brought suit to recover the actual value of the platinum. Defendant sought to limit its liability to the declared valuation by invoking the released value clause of the receipt. The trial court agreed with defendant,[5] but the appellate division modified the judgment, allowing recovery of the actual value less the balance due on the proper transportation charge.[6] The New York Court

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[1] After accepting the package, the driver proceeded to treat it as a so-called "value" shipment—one with a declared value of $50.00 or more per pound—and recorded it as such in his "value" book. Upon arrival at defendant's freight terminal, he delivered the package to the custodian of the "value" room. The court, although reciting these events in detail, stated that this evidence was immaterial because whether or not defendant treated the shipment as required by the tariff was not at issue. W. R. Grace & Co. v. Railway Express Agency, Inc., 8 N.Y.2d 103, 107, 168 N.E.2d 362, 364, 202 N.Y.S.2d 281, 285, *cert. denied*, 364 U.S. 830 (1960). However, this evidence is relevant to whether defendant had knowledge of the contents of the package. See note 21 *infra* and accompanying text.

[2] The term "released rate" refers to the rate charged for shipments of goods at the declared value of $50.00. See generally *In re* Released Rates, 13 I.C.C. 550 (1908).

[3] Defendant classifies the goods which it transports into two groups—"merchandise" and "money." The latter includes cash, bonds and other securities, drafts, notes, jewelry, precious stones, precious metals, money orders, and travelers' checks. The "merchandise" classification includes all other goods which the company handles. See Brief for Respondent, pp. 12-20.

[4] Items in the "money" classification are shipped at so-called "gold coin" rates, requiring declaration of actual value. W. R. Grace & Co. v. Railway Express Agency, Inc., 8 N.Y.2d 103, 105, 168 N.E.2d 362, 363, 202 N.Y.S.2d 281, 283 (1960).

[5] 17 Misc. 2d 992, 182 N.Y.S.2d 694 (Sup. Ct. 1958).

[6] 9 App. Div. 2d 425, 193 N.Y.S.2d 780 (1959). The driver collected $2.90; under defendant's tariff, the rate for $56,000 of platinum was $130.93.

of Appeals affirmed, holding that since defendant's platinum tariff provided for shipment at actual value only, the statement of a lower value was ineffective to limit liability. *W. R. Grace & Co. v. Railway Express Agency, Inc.*, 8 N.Y.2d 103, 168 N.E.2d 362, 202 N.Y.S.2d 281, *cert. denied*, 364 U.S. 830 (1960).[7]

Although common carriers have never been able to exempt themselves completely from liability for loss of goods entrusted to them,[8] their right to limit liability has long been recognized.[9] The basis of such a limitation has been termed estoppel [10]—the carrier may limit the extent of his liability by providing his services to the shipper at more advantageous terms,[11] and, conversely, he may demand a greater remuneration in return for his agreement to stand liable for the actual value of the goods shipped.[12] This historical method of liability limitation established a close and direct relationship between rates and extent of liability. In keeping with this relationship, the United States Supreme Court early held that a free choice of rates was essential to the validity of any agreement to limit liability.[13] The Interstate Commerce Act, whose primary purpose was to eliminate and avoid discriminations among shippers,[14] provides for this liability-limiting scheme,[15] but with one important qualification: regulated common

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[7] Judges Dye and Van Voorhis dissented on the ground that defendant did not have knowledge of the contents of the package and therefore should not be held liable. Judge Dye thought the case essentially the same as where the carrier is deceived as to the contents of the package. Judge Van Voorhis found no effective notice to the carrier.

[8] 1 HUTCHINSON, CARRIERS § 418 (3d ed. 1906). See also Adams Express Co. v. Croninger, 226 U.S. 491, 509 (1913).

[9] *Ibid.*

[10] It has been argued that "estoppel" is not the proper term here because in many cases the carrier knows the actual value of the property and therefore is not misled to his detriment by the valuation. See Biklé, *Agreed Valuation as Affecting the Liability of Common Carriers for Negligence*, 21 HARV. L. REV. 32 (1907); Goddard, *Liability of the Common Carrier as Determined by Recent Decisions of the United States Supreme Court*, 15 COLUM. L. REV. 399, 412-14 (1915); Note, 66 U. PA. L. REV. 166 (1917). But this is the language of the Supreme Court. See Hart v. Pennsylvania R.R., 112 U.S. 331, 341 (1884). The rationale of *Hart* has had continued application under the Interstate Commerce Act. See Adams Express Co. v. Croninger, 226 U.S. 491, 510-11 (1913).

[11] Hutchinson phrases his discussion generally, speaking of more advantageous terms. 1 HUTCHINSON, CARRIERS § 388 (3d ed. 1906). Since the term in which the shipper is usually most interested is the rate he must pay, this has been the crucial consideration of the courts from an early date. See note 12 *infra*.

[12] This rule was declared by Lord Mansfield in Gibbon v. Paynton, 4 Burrows 2298, 98 Eng. Rep. 199 (K.B. 1769), where he stated: "His [the common carrier's] warranty and insurance is in respect of the *reward* he is to receive: and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security: and therefore he ought, in reason and justice, to have a greater reward." *Id.* at 2300, 98 Eng. Rep. at 200.

[13] Hart v. Pennsylvania R.R., 112 U.S. 331, 337 (1884).

[14] See, *e.g.*, Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 361 (1943); Louisville & N.R.R. v. United States, 282 U.S. 740, 749 (1931); Pittsburgh, C.C. & St. L.R.R. v. Fink, 250 U.S. 577, 582 (1919).

[15] Interstate Commerce Act § 20(11), 46 Stat. 251 (1930), 49 U.S.C. § 20(11) (1958), Cincinnati, N.O. & Tex. Pac. Ry. v. Rankin, 241 U.S. 319, 327-28 (1916).

carriers[16] may now invoke the doctrine of estoppel based on a choice of rates only where their tariffs filed with the Interstate Commerce Commission[17] allow them to offer the shipper such a choice.[18] Thus, in *Union Pac. R.R. v. Burke*,[19] the Supreme Court held that where a carrier's tariff did not provide for a choice of rates, it could not invoke a limited liability clause in the preceding connecting carrier's bill of lading. This and other cases[20] have led to the broad rule of construction that tariffs filed under the commerce act have the force of law and any deviation from them is ineffective.

While the court in the present case found that the carrier had knowledge of the contents—if not the actual value—of the shipment, the opinion restates the broad rule which suggests that a similar result would be reached where the carrier had no knowledge of the contents of the shipment.[21] The statute does not explicitly provide—as a condition of the carrier's duty to charge the applicable rate[22] and to stand liable to the extent prescribed by that rate[23]—that the carrier must have knowledge of the contents at the time of shipment. And the Supreme Court's long-enunciated rule has been that the enforcement of the commerce act and the tariffs filed thereunder is paramount to the equities involved in a

[16] "Common carriers" here refers only to those carriers which fall under the jurisdiction of the Interstate Commerce Act. The carriers subject to the act are defined in § 1(1), 41 Stat. 474 (1920), 49 U.S.C. § 1(1) (1958).

[17] The filing of tariffs is required under § 6(1) of the Interstate Commerce Act, 34 Stat. 586 (1906), 49 U.S.C. § 6(1) (1958).

[18] Interstate Commerce Act § 6(7), 34 Stat. 586 (1906), 49 U.S.C. § 6(7) (1958); Interstate Commerce Act § 20(11), 46 Stat. 251 (1930), 49 U.S.C. § 20(11) (1958).

[19] 255 U.S. 317 (1921).

[20] See, *e.g.*, Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520 (1939); Kansas City So. Ry. v. C. H. Albers Comm'n Co., 223 U.S. 573, 598 (1912).

[21] While the court in the instant case laid considerable emphasis on the fact that the carrier had been apprised of the contents of the package, doubt arises concerning the scope of the holding from the court's citation of New York & Hond. Rosario Mining Co. v. Riddle Airlines, 3 App. Div. 2d 457, 162 N.Y.S.2d 314 (1957), *aff'd*, 4 N.Y.2d 755, 149 N.E.2d 93, 172 N.Y.S.2d 168 (1958). In that case the shipper sought to ship dore—a mixture of gold and silver bullion—at a released rate; such a practice was not provided for in the carrier's tariff. Part of the shipment was lost and shipper sued for the actual value of the property. The trial court limited recovery to the released value but the appellate division allowed full recovery. The court of appeals affirmed in a memorandum opinion. In citing to *Rosario*, the court in the instant case stated: "The arguments of the defendants are based on the express receipt's stated limitation of $50, *on the defendant's lack of knowledge of the actual value*, and on the statement . . . that plaintiff had its own 'outside insurance.' All these arguments are answered by the Rosario decision (*supra*)." Instant case at 107, 168 N.E.2d at 364, 202 N.Y.S.2d at 285. (Emphasis added.) The clear implication is that even granting these arguments, the decision would be the same, since the only conceivable answer which the *Rosario* decision could make to the claim of lack of knowledge would be to adjudge it immaterial.

[22] See Interstate Commerce Act § 6(7), 34 Stat. 586 (1906), 49 U.S.C. § 6(7) (1958).

[23] Section 20(11) of the act allows carriers to establish rates dependent on the declared value of the goods. The extent of the carrier's liability is therefore determined by the rate which the shipper pays. Interstate Commerce Act § 20(11), 46 Stat. 251 (1930), 49 U.S.C. § 20(11) (1958).

particular situation.[24] It appears clear, however, that an exception will be made in the case of fraud.[25] What is not clear is whether a similar exception will be made in the case of a *non*fraudulent misrepresentation by the shipper, where the carrier, relying on this representation, ships at a released rate goods which are required by tariff to be shipped at actual value.[26] Here in particular the breadth of the court's holding in the instant case would become crucial. Such a case would arise most commonly where the shipper is acting through an agent who has not been informed of the exact nature of the package[27] or where shipper does not realize the need for precisely specifying the contents.[28] Acting on this misrepresentation, the carrier is precluded from taking precautions commensurate with its contingent liability. If held liable for the full value of the property, the carrier suffers an irremediable detriment when he unwittingly transports the goods under released procedures.[29] These procedures do not assure

[24] This policy is best exemplified in the line of cases allowing the carrier to recover the proper rate after shipment of the goods has been completed. See, *e.g.*, Baldwin v. Scott County Milling Co., 307 U.S. 478 (1939); Pittsburgh, C.C. & St. L.R.R. v. Fink, 250 U.S. 577 (1919). Where equitable considerations coincide with rigorous enforcement of the act, the Court has included such considerations in its opinions. This has most commonly occurred where the shipper is suing for the actual value of a lost or damaged shipment after shipping at a lawful released rate. See, *e.g.*, American Ry. Express Co. v. Lindenburg, 260 U.S. 584 (1923); Missouri, Kan. & Tex. Ry. v. Harriman, 227 U.S. 657 (1913); Adams Express Co. v. Croninger, 226 U.S. 491 (1913). But where enforcement of the tariffs works a clear inequity on the shipper who had no actual knowledge of the terms of shipment, the Court has not hesitated to reject equitable arguments. See Louisville & N.R.R. v. Maxwell, 237 U.S. 94, 97 (1915). This rejection would point to the conclusion that any discussion of the equities of a particular situation is makeweight. *Cf.* Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 361 (1943).

[25] Atchison, T. & S.F. Ry. v. Robinson, 233 U.S. 173, 180, 181 (1914) (dictum); Great No. Ry. v. O'Connor, 232 U.S. 508, 515-16 (1914) (dictum). The leading state case is in accord with this view. See Ellison v. Adams Express Co., 245 Ill. 410, 92 N.E. 277 (1910).

[26] In Great No. Ry. v. O'Connor, *supra* note 25, the Court stated that where "there are alternative rates based on value . . . to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value." 232 U.S. at 515-16. The Court has never discussed the nature of the exception which it suggested in the case of "rebating or false billing" and whether it would also be applicable in a one-rate situation. Nor has it defined what it meant by these terms—whether the willful and knowing elements of § 10 of the Interstate Commerce Act, 36 Stat. 549 (1910), 49 U.S.C. § 10 (1958), must be present or whether they would include inadvertent errors on the part of the shipper.

[27] *Cf.* New York Cent. R.R. v. Goldberg, 250 U.S. 85 (1919), where the carrier claimed he was absolved from all liability because of the misrepresentation. The case involved misclassification of goods rather than shipment at released rate.

[28] *Cf.* A. Elgart & Sons, Inc. v. Peoples Express Co., 11 Misc. 2d 499, 172 N.Y.S.2d 661 (Sup. Ct. 1958). The carrier's tariff allowed shipment of "celanese and rayon fibres, yarns and fabrics, silk, mixtures of the foregoing and unfinished products thereof" at released rates; the shipment in question was made of wool. The court refused to allow the carrier to invoke the released rate clause.

[29] Compare Baldwin v. Scott County Milling Co., 307 U.S. 478 (1939); Pittsburgh, C.C. & St. L.R.R. v. Fink, 250 U.S. 577 (1919); Louisville & N.R.R. v. Maxwell, 237 U.S. 94 (1915). In these cases the Court allowed the carrier to recover the applicable freight rates after completion of shipment. This result undoubtedly causes detriment to the shipper for he is denied access before shipment to an

the safe delivery of the goods with the degree of certainty that is provided in the handling of goods shipped at actual value.[30] In the limited situation of nonfraudulent misrepresentation where the carrier has acted to its detriment,[31] it would seem advisable to depart from the objective application of the statute and to treat the transaction as it was represented to the carrier—that is, as a tender of a package amenable to shipment at the released rate.[32] While in no way discharging the carrier from his initial duty to inquire into the contents of the package, such treatment would relieve the carrier from the burden of full liability where he has made reasonable efforts to determine the proper classification of the package. The carrier would thereby be protected where the defense of fraud is not available.[33] In this instance, discrimination among shippers would more likely be avoided by tempering rigorous enforcement of the act with practical and equitable considerations.[34]

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important factor upon which to determine the desirability of the mode of shipment. However, this detriment is not so severe as that suffered by the carrier in the case of a misrepresentation because the shipper nevertheless receives everything to which he is entitled under the correct rate.

[30] Railway Express, for example, requires that goods in the "money" classification be shipped under armed guard and stored in a so-called "value" room, access to which is strictly controlled. Instant case at 107, 169 N.E.2d at 364, 202 N.Y.S.2d at 284-85.

[31] Proven detriment should be an essential element for an exception to the rule that tariffs should be strictly enforced. Where the carrier has acted to its detriment, the situation is, as far as the carrier is concerned, essentially the same as where it has been a victim of a fraud perpetrated by the shipper. Only the willful nature of the shipper's act is absent, and this, insofar as it affects the carrier's conduct, is immaterial. The Supreme Court has not explained the rationale of its indicated exception to the rule in the case of fraud. See notes 25-26 *supra* and accompanying text. If the reason is punitive in nature, then any extension would not be dictated. But if the reason is the unfairness which application of the tariff would work on the carrier, then the same rationale would apply to the case of the nonfraudulent misrepresentation. Note that the common law made no such distinction. Biklé, *supra* note 10. Nor did Judge Dye, in his dissent, find any grounds upon which to distinguish the situations. Instant case at 107-08, 168 N.E.2d at 364-65, 202 N.Y.S.2d at 285.

[32] While the carrier has an affirmative duty to inquire into the contents of the package tendered for shipment, he does not have to ask if shipper wishes to ship at released or actual value. He may merely present the shipper with the limited liability receipt and it is then incumbent upon the shipper to express his desire to ship at actual value. Adams Express Co. v. Croninger, 226 U.S. 491, 508-09 (1913).

[33] See note 25 *supra* and accompanying text. It should be noted that the elements of fraud present a formidable burden of proof to the carrier. In order to invoke the defense he must prove that the shipper "knowingly and willfully" obtained or sought to obtain transportation "at less than the regular rates . . . ." Interstate Commerce Act § 10, 36 Stat. 549 (1910), 49 U.S.C. § 10 (1958).

[34] To allow full recovery where the carrier has been misled to his detriment would achieve discrimination a number of ways. Since there is no opportunity for the carrier to take the commensurate precautions, the possibility of loss or damage and the ensuing liability will exceed that expected where the carrier can take extra measures. The carrier must necessarily include these losses—which can be substantial, as in the instant case—in the determination of its rates. Thus an additional burden is borne by all shippers because of the conduct of a few. Furthermore, to predicate recovery on retroactive application of the proper rate in effect sanctions disclosure of the contents after shipment. Absent loss and claim for full value, the shipper's improper payment will often go undetected. This too will result in a relative disadvantage to other shippers of the same class of goods.

CONSTITUTIONAL LAW—OATH WHICH INCLUDES DECLARATION THAT TAKER BELIEVES IN GOD HELD TO BE A VALID PREREQUISITE FOR STATE OFFICE

Petitioner was appointed by the governor to the position of notary public but was denied his commission by the circuit court clerk for refusing to take an oath of office which included the statement: "I . . . do declare that I believe in the existence of God." [1] A petition for writ of mandamus against the clerk was denied by the circuit court,[2] and the Court of Appeals of Maryland affirmed. After concluding that the oath was authorized by the state constitution,[3] the court held that the oath did not impair petitioner's absolute right of religious belief because he was not compelled to hold public office, and that the required profession of belief was not "so patently inappropriate as a security for good conduct, as to make it invidious under the Fourteenth Amendment." [4] *Torcaso v. Watkins,* 223 Md. 49, 162 A.2d 438, *prob. juris. noted,* 364 U.S. 877 (1960) (No. 373).

Oaths of loyalty to the democratic form of government and of support for the state constitution are often required of state public officers; such oaths have been upheld over the objection that they violate the federal constitution.[5] An oath to support the federal constitution is required of all public officers, state and federal, by article VI, which also forbids any religious test for public office "under the United States." More broadly phrased freedom of religion guarantees are found in the first amendment which has been held to apply to the states through the due process and equal protection clauses of the fourteenth amendment.[6] Although seven

[1] Torcaso v. Watkins, 162 A.2d 438, 440 (Md. 1960). Petitioner had agreed to take the oath prescribed for "every person elected, or appointed, to any office of profit or trust" by MD. CONST. art. 1, § 6, which includes no similar attestation. See note 3 *infra.*

[2] The lower court opinion is unreported.

[3] The court's justification for its holding on the Maryland constitutional issue is somewhat unclear. MD. CONST. art. 1, § 6, prescribes an oath for all elected or appointed officials which permits swearing or affirmance, and makes no mention of a declaration of belief in the existence of God. The Declaration of Rights, on the other hand, provides "that no religious test ought ever to be required . . . *other than* a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." MD. CONST. art. 37. (Emphasis added.) In view of the fact that the constitutionally prescribed oath makes no mention of belief in God, the first and second clauses of article 37 are somewhat contradictory. After finding that the only possible enabling legislation for the oath in the instant case, MD. ANN. CODE art. 70, § 9 (1957), now refers only to constitutionally outlawed tests, the court concluded that no enabling legislation was required and that the clerk's requirement was in accord with the constitution.

[4] Instant case, 162 A.2d at 444.

[5] Adler v. Board of Educ., 342 U.S. 485 (1952) (schoolteachers); Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (municipal employees); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (state public officers). *Cf.* Weiman v. Updegraff, 344 U.S. 183 (1952) (loyalty oath requirement not requiring scienter invalidated); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (state oath requirement invalidated as *ex post facto* law).

[6] *E.g.,* Fowler v. Rhode Island, 345 U.S. 67 (1953); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

state constitutions provide for requirements similar to the one in the instant case,[7] apparently no case has previously tested a direct requirement of theistic belief.

By reason of his nonbelief, the atheist has traditionally been held incompetent to serve as a juror or a witness.[8] The Maryland court, in referring to these disabilities as justification for the requirement in the instant case, intimates that nonbelief is not comprehended within guarantees of freedom of religion.[9] Although some states still allow credibility to be attacked on the grounds of nonbelief,[10] the stigma of incompetency has been lifted in the great majority of states [11] and one court has held that the common-law rule as applied to a defendant in a criminal case is violative of the fourteenth amendment.[12] But the continued vitality of these disabilities in some states does not validate the test in the instant case, for their constitutionality has never been affirmatively pronounced by the Supreme Court.[13] On the contrary, the historical background [14] as well as subsequent commentary [15] on the Constitution indicate that its protection was meant to extend to the nonbeliever; and there have been modern

[7] See ARK. CONST. art. 19, § 1; MISS. CONST. art. 14, § 265; N.C. CONST. art VI, § 8; PA. CONST. art. 1, § 4; S.C. CONST. art. 17, § 4; TENN. CONST. art. 9, § 2; TEX. CONST. art. 1, § 4.

[8] 6 WIGMORE, EVIDENCE § 1817 (3d ed. 1940). MD. CONST. art. 36 provides both disabilities.

[9] "The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly." Instant case, 162 A.2d at 443.

[10] A few states explicitly provide for attacks on credibility because of nonbelief. See GA. CODE ANN. § 38-1602 (1954); IND. ANN. STAT. § 2-1724 (1946); ME. REV. STAT. ANN. ch. 113, § 113 (1954); MASS. ANN. LAWS ch. 233, § 19 (1956); TENN. CODE ANN. § 24-102 (1955). Others have incorporated the common-law grounds for incompetency into the basis of credibility attacks. IOWA CODE § 622.2 (1950); NEB. REV. STAT. § 25-1211 (1956); N.M. STAT. ANN. § 20-1-8 (1953).

[11] 6 WIGMORE, EVIDENCE § 1828 (3d ed. 1940).

[12] State v. Levine, 109 N.J.L. 503, 162 Atl. 909 (Sup. Ct. 1932).

[13] The disabilities derive from the compurgation oaths of early English common law. 6 WIGMORE, EVIDENCE § 1815 (3d ed. 1940). In both England and the United States the trend has been away from the requirement of religious belief. *Id.* § 1828. It would seem that the intervention of constitutional religious guarantees would strengthen this trend in the United States. Compare Mr. Justice Frankfurter's contrast of English and United States experience in church-state cooperation in education, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 213-17 (1948). "A totally different situation elsewhere, as illustrated for instance by the English provisions for religious education in State-maintained schools, only serves to illustrate that free societies are not cast in one mould." *Id.* at 216.

[14] Luther King, Maryland's delegate to the Constitutional Convention, writing of article VI, said: "The part of the system which provides, that *no religious test* shall ever be required as a qualification of any office or public trust under the United States, was adopted by a great majority of the convention, and without much debate; however, there were some members *so unfashionable* as to think, that a *belief of the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that, in a Christian country, it would be *at least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism." 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 227 (1911).

[15] "It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects . . . that it was deemed advisable to exclude from the national government all power to act upon the

Supreme Court dicta couched in terms of protecting belief and nonbelief alike.[16]

Three factors recurrently appear in the language of Supreme Court cases determining the validity of regulations limiting—either directly[17] or as applied[18]—the free exercise of religion. First, is there a legitimate and important state interest which the regulation seeks to protect?[19] Second, are the means which the regulation employs reasonably appropriate to bring about the end sought?[20] And third, to what extent must the regulation, in order to attain that end by the chosen means, necessarily infringe upon the individual's religious freedom?[21] In the instant case, the state interest in assuring the good quality of its officers is undoubtedly legitimate. Historically it has been a state prerogative to set standards and qualifications for its public servants,[22] and the courts have been slow to find such standards inappropriate.[23]

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subject . . . . Thus . . . the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." 3 STORY, COMMENTARIES ON THE CONSTITUTION § 1871 (1833).

[16] "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory." Zorach v. Clauson, 343 U.S. 306, 314 (1952). "The First Amendment has lost much if the religious follower and the atheist are no longer to be regarded as entitled to equal justice under law." *Id.* at 320 (dissent). "Neither a state nor the Federal Government . . . can force or influence a person . . . to profess a belief or disbelief in any religion." Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948). The first amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). The first amendment "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[17] *E.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

[18] *E.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953).

[19] See Davis v. Beason, 133 U.S. 333, 341 (1890); Reynolds v. United States, 98 U.S. 145, 164-66 (1878). *Compare* Prince v. Massachusetts, 321 U.S. 158, 167-69 (1944), *with* Marsh v. Alabama, 326 U.S. 501, 505-06 (1946), *and* Martin v. Struthers, 319 U.S. 141, 143-44 (1943).

[20] Although in the field of economic regulation, the relation of means to end is generally not questioned, see Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955), the Court has been more willing to consider effectiveness of means in cases involving first amendment freedoms and has tested statutes both for ineffectiveness and for being overly effective. As to ineffective statutes, see West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636-37, 644 (1943); *cf.* Meyer v. Nebraska, 262 U.S. 390, 401 (1923). See also Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319 (1866). As to overly effective statutes, see Speiser v. Randall, 357 U.S. 513, 529 (1958); Winters v. New York, 333 U.S. 507, 520 (1948); United States v. CIO, 335 U.S. 106, 141-42 (1948) (Rutledge, J., concurring); Martin v. Struthers, 319 U.S. 141, 148-49, 151 (1942) (Murphy, J., concurring). See also Note, 109 U. PA. L. REV. 67, 75-76, 80-81, 111 (1960).

[21] Saia v. New York, 334 U.S. 558 (1948); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statutory offense); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring).

[22] See Wilson v. North Carolina, 169 U.S. 586, 594 (1898) (railroad commissioner summarily discharged); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (Holmes, J.) (police officer dismissed without cause); *cf.* Snowden v. Hughes, 321 U.S. 1 (1944) (failure of state board to certify result of a primary election).

[23] In recent years the Supreme Court has made a closer examination of state qualifications for office. See Weiman v. Updegraff, 344 U.S. 183 (1952); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); *cf.* Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

The effectiveness of the Maryland oath requirement rests upon the validity of its equation of belief in God with moral accountability. But even assuming that morally accountable persons will make the best notaries public, there is no assurance that believers in the undefined "God" to whom the oath refers will also believe themselves morally accountable. The Maryland court asserted that it would be paradoxical if notaries public did not believe in the sanctity of oaths which they administer.[24] Taken as a justification of the belief requirement, this statement rests on an unsupported assumption that belief in God will insure belief in the sanctity of oaths. Because the oath requires a statement of subjective belief which is impossible of proof,[25] its effectiveness to eliminate the unscrupulous from public office is doubtful. Those sought to be barred would take the oath; only the conscientious nonbeliever would be denied public office.[26]

The Maryland court emphasized that petitioner was not forced to become a notary public; therefore, there was no infringement of his right of belief.[27] But positive compulsion is only one aspect of infringement; the absence of force is not conclusive of constitutionality. The question is not only whether petitioner is compelled to believe, but also whether the requirement results in an arbitrary or discriminatory exclusion from public employment.[28] In assessing the validity of an alleged encroachment on fourteenth amendment protection, the Supreme Court has indicated that the state action must meet a more stringent test when the guarantee in-

[24] Instant case, 162 A.2d at 443-44. The paradox seems slight when it is considered that the duties of a notary public are largely ministerial, see MD. ANN. CODE art. 68, §§ 3-5 (1957); it would also seem that the validity or efficacy of an oath is more dependent upon the character of the taker than on the belief of the person administering it.

[25] Contrast the loyalty oaths which have been upheld by the Supreme Court. See note 5 *supra*. These oaths are capable of enforcement, for their violation is manifested by provable action such as membership in the Communist Party or its front organizations.

[26] It should be noted that alternative means are provided for the protection of the state interest. The discretion vested in the governor in the selection of appointees is limited by the requirement that candidates be of "known good character." MD. ANN. CODE art. 68, § 1 (1957). The state interest is also protected after assumption of office by criminal sanctions which are provided for dereliction of official duty. MD. ANN. CODE art. 27, §§ 23, 80, art. 69, § 11 (1957); MD. ANN. CODE art. 68, § 1 (Supp. 1960).

[27] Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934), and *In re* Summers, 325 U.S. 561 (1945), presented a similar extent of infringement, and an argument analogous to that of the Maryland court was employed: because petitioner was denied only a privilege, there was no infringement of his rights. But Justice Cardozo, concurring in *Hamilton*, 293 U.S. at 265, also stressed the indirectness of infringement, and *Summers* relied on since-overruled cases (United States v. MacIntosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929)—both overruled by Girouard v. United States, 328 U.S. 61, 69 (1946)), and stated that the discrimination there in issue was not based on religious grounds. The privilege-right dichotomy has since been given short shrift by the Court in Weiman v. Updegraff, 344 U.S. 183 (1952). See note 28 *infra*.

[28] In Weiman v. Updegraff, 344 U.S. 183 (1952), it was argued to the Supreme Court that Adler v. Board of Educ., 342 U.S. 485 (1952), Gerende v. Board of Supervisors, 341 U.S. 56 (1951), and United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), established that public employment was only a privilege and could be restricted at will by the states. In answer the Court stated: "To draw from this language [in the above cases] the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . . We need not pause to consider whether an abstract right of public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 191-92.

volved is one of a first amendment freedom;[29] and although action based on one's religious conviction may be validly limited to some degree, the underlying conviction is inviolate.[30] In the instant case, the requirement is of belief as belief, with no further justification. It is this directness that makes the instant case unique among the religion cases previously considered by the Supreme Court. It may well be that to require belief in God as a precondition for holding office is per se arbitrary.[31]

Yet another area of first amendment protection upon which the Maryland oath requirement may infringe can be seen in those cases dealing with the "establishment of religion" clause. While these cases speak of a "wall of separation" between church and state,[32] the practicalities of our society[33] and the decisions themselves show that the separation is not an absolute one. In *Zorach v. Clauson*,[34] the Supreme Court upheld a "released time" program facilitating religious education of children whose parents requested it; *Everson v. Board of Educ.*[35] allowed a reimbursement of money spent for school bus fares to parents of parochial school students.

[29] "Much of the vagueness of the due process clause disappears when the specific prohibition of the First [Amendment] becomes its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of the press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." Barnette v. West Va. State Bd. of Educ., 319 U.S. 624, 639 (1943).

[30] "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). See also Craig v. State, 220 Md. 590, 599-600, 155 A.2d 684, 690 (1959).

[31] *Cf.* Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (Dist. Ct. App. 1957). *But cf.* Clark v. United States, 236 F.2d 13 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956); George v. United States, 196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946). See note 36 *infra*.

[32] "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). See Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948). "[S]o far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute." Zorach v. Clauson, 343 U.S. 306, 312 (1952).

[33] See generally HORN, GROUPS AND THE CONSTITUTION 44-66 (1956); O'Brien, *Religion and the State Government*, 38 U. DET. L.J. 34 (1960).

[34] 343 U.S. 306 (1952).

[35] 330 U.S. 1 (1947).

In the instant case, the requirement goes beyond the type of "indirect" aids to religion previously upheld in that it is a governmental sanction of a religious tenet.[36] Defining religion as man's relations with his Creator, nonbelief in such a Creator is not religion, but the requirement of such a belief would still violate governmental neutrality and establish religion, if not *a* religion.[37] On the other hand, if religion is defined for constitutional purposes as a code of ethical conduct that does not require belief in God, nonbelief is not nonreligion; it is another kind of religion—a constitutionally protected belief.[38] Under this definition, the oath in the instant case acts not only to establish religion in general, but also to give preferential treatment to theism over nontheistic beliefs.[39] Under either analysis, a state's requirement that its officers attest to a religious belief[40] entails a favoring of and identification with religion that would constitute a material breach in the "wall of separation."

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[36] The propriety of a "belief in God" qualification has been questioned in two other contexts—tax exemption of religious organizations and draft exemption for conscientious objectors. Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957), and Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (Dist. Ct. App. 1957), indicate that exemption of places of religious worship from a general property tax is not improper so long as the definition of "religion" is not limited to belief in God (such a limitation would work an establishment of religion). The draft exemption cases—Clark v. United States, 236 F.2d 13 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956); George v. United States, 196 F.2d 445 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946)—upheld the statutory requirement that request for exemption must be based on religious belief, defined as man's relations with his Creator. In none of these cases was the exemption itself challenged; indeed, it is unlikely that any particular person or group would have standing to attack either type of exemption. Aside from the fact that the tax cases are in line with the per se analysis suggested in text accompanying notes 23-26 *supra*, allowing the exemption can escape the establishment of religion attack on historical and economic grounds. See HORN, *op. cit. supra* note 33, at 54-58; O'Brien, *supra* note 33, at 36-40; 58 COLUM. L. REV. 417, 418 (1958). The draft cases pose a far greater problem. That Congress has the power both to deny exemption from military service to conscientious objectors and to grant such exemptions has been long recognized. See the Selective Draft Law Cases, 245 U.S. 366 (1918). But the grant or denial of exemption on the basis of whether or not the applicant holds a particular religious belief cannot seek support from notions of Congress' plenary power or ease of administration. *But see* 58 COLUM. L. REV. 417, 420-21 (1958). It should suffice to point out that all three cases arose in the same circuit and the substantive problem has not been faced by the Supreme Court.

[37] The first amendment forbids establishment *of* religion, not establishment of *a* religion. A possible interpretation of this phrasing is that it was meant to prohibit not only the establishment of a particular sect, but also the fostering of any religious principle.

[38] See note 16 *supra* and accompanying text. It should be noted that many definitions of religion and many organizations generally thought of as religions do not require or profess belief in a supreme being. See Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 690, 315 P.2d 394, 404-05 (Dist. Ct. App. 1957).

[39] It can hardly be denied that to require a particular belief for public office would act as a benefit to the religion holding such a belief. See 3 STORY, *op. cit. supra* note 15, § 1841. Compare the mention of "aid" to religion in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948).

[40] Article VI of the federal constitution proscribes religious tests as qualification for public office, but its application is limited to positions "under the United States," and presumptively refers only to federal offices. The clause is nonetheless illustrative of the religious liberty guaranteed by the Constitution. See Everson v. Board of Educ., 330 U.S. 1, 44 (1947) (dissent); *In re* Summers, 325 U.S. 561, 576 (1945) (dissent); 3 STORY, *op. cit. supra* note 15, § 1841, at 705.

FAIR TRADE—PUBLIC POLICY REQUIRES PROOF OF "FREE AND OPEN COMPETITION" DESPITE ADMISSION OF THAT FACT BY CONTESTING PARTY

Gulf Oil Corporation sought to enjoin a nonsigner service station operator from selling the corporation's gasoline at less than fair trade prices. In his answer, the service station operator admitted Gulf's allegation that "Gulf brand gasoline . . . is in fair and open competition throughout Pennsylvania with gasolines of the same general class produced by others." [1] The trial court permanently enjoined the service station operator from selling the corporation's motor fuels at less than fair trade prices. On appeal, the Supreme Court of Pennsylvania reversed, holding that the distributor seeking to enforce resale price maintenance under the fair trade acts [2] must prove that the product sought to be fair traded is in fact in "fair and open competition with other products in the same general class" [3] and that "mere admission by the adversary is not sufficient to provide the essential prerequisites necessary to invoke the statutory rights and exemptions provided by the act." [4] *Gulf Oil Corp. v. Mays,* 401 Pa. 413, 164 A.2d 656 (1960).[5]

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[1] Gulf Oil Corp. v. Mays, 401 Pa. 413, 164 A.2d 656 (1960). The issue of fair and open competition was decided at the trial level solely on the pleadings, Record, p. 26a, and was neither briefed nor argued on appeal. Petition for Reargument, p. 2.

[2] Pennsylvania Fair Trade Act, PA. STAT. ANN. tit. 73, §§7-11 (1950), as amended. Inasmuch as the oil corporation's products were shipped in interstate commerce, the Miller-Tydings Act (Antitrust), 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958), and the McGuire Act (Fair Trade), 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958), are also applicable.

[3] Gulf Oil Corp. v. Mays, 401 Pa. 413, 418, 164 A.2d 656, 659 (1960), quoting the Pennsylvania Fair Trade Act § 1, PA. STAT. ANN. tit. 73, § 7 (Supp. 1959). See also the equivalent language of the permissive federal fair trade statutes cited note 2 *supra.*

[4] Gulf Oil Corp. v. Mays, 401 Pa. 413, 418, 164 A.2d 656, 659 (1960). It seems immaterial to the decision of the present case that the defendant service station operator was a nonsigner. It is inconceivable that the court would apply the doctrine of contractual estoppel to a signer when, on grounds of public policy, it did not hold the present defendant estopped by his pleadings. The issue, in the eyes of the court, is not whether the defendant is estopped from asserting an absence of free and open competition, but whether the court will enforce resale price maintenance absent positive proof of the existence of such competition. The chief legal issue likely to turn on the fact that a defendant is a nonsigner is that of arbitrary taking of property under a due process attack on the constitutionality of a fair trade statute, although this fact may also bear some weight where the attack is directed to an allegedly unconstitutional delegation of legislative power. See Conant, *Resale Price Maintenance: The Constitutionality of Nonsigner Clauses,* 109 U. PA. L. REV. 539 (1961).

[5] In a vigorous dissent, Justice Benjamin R. Jones, joined by Justice Bell, attacks the opinion of the court as an unprecedented refusal to accept a chancellor's finding of fact based on an admission in an adversary's pleadings. Instant case at 424-25, 164 A.2d at 662. The dissent notes, however, that the majority bases its decision on the state interest involved in the case, but makes no attempt—beyond pointing out that the commonwealth was not a party in the case—to meet the main thrust of the majority opinion. *Id.* at 425, 164 A.2d at 662. The majority, in implementing its view of public policy, is not breaking with established procedure but rather is holding that the procedure is not applicable under the circumstances of the present case. See note 27 *infra* and accompanying text. And the unusual procedural aspect of the instant case indicates that the majority will maintain with vigor the public policy which it espouses in the present decision.

Resale price maintenance agreements have been held unenforceable at common law [6] and, where the product involved is in interstate commerce, such price maintenance is a per se violation of the Sherman Act [7] unless carried out in compliance with permissive statutes. The Miller-Tydings Amendment [8] and the McGuire Act [9] exempt resale price maintenance from the federal antitrust laws where it conforms to state law and where the commodities sought to be fair traded or their containers bear "the trademark, brand, or name of the producer or distributor . . . ." [10] The exemption does not apply to agreements "between persons, firms, or corporations in competition with each other," [11] and is limited to goods "in free and open competition with commodities of the same general class produced or distributed by others . . . ." [12] The Pennsylvania Fair

[6] See Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911); John D. Park & Sons v. Hartman, 153 Fed. 24 (6th Cir. 1907). *Contra*, Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144 (1913). For a summary of American common-law cases on the subject, see HANDLER, CASES ON TRADE REGULATION 1050 n.2 (1937). For the English decisions, see *id.* at 1050-51 & n.3. There are apparently no Pennsylvania decisions on the issue.

[7] Dr. Miles Medical Co. v. John D. Park & Sons, *supra* note 6. See Sunbeam Corp. v. Masters of Miami, Inc., 225 F.2d 191 (5th Cir. 1955).

[8] 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958). This amendment exempts state-authorized fair trade only from the Sherman Act and was held by the Supreme Court not to apply to "nonsigner" provisions. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[9] 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958). This amendment to the Federal Trade Commission Act is expressly applicable to nonsigners and exempts state-legalized fair trade from the operation of all federal antitrust laws.

[10] McGuire Act, 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(2) (1958); Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958). See PA. STAT. ANN. tit. 73, § 7 (Supp. 1959). The Pennsylvania statute, as originally enacted, contained no express provision applicable to unlabelled products dispensed by labelled vending machines. The act was amended on June 12, 1941, PA. STAT. ANN. tit. 73, § 7 (Supp. 1959), to include the words "or the vending equipment from which said commodity is sold to the consumer bears [the trade-mark, etc. of the producer]." The federal fair trade acts have been held applicable to products such as gasoline without the enactment of any specific provision. United States v. Socony Mobil Oil Co., 150 F. Supp. 202 (D. Mass. 1957), *cause certified*, 252 F.2d 420 (1st Cir.), *appeal dismissed*, 356 U.S. 925 (1958). One reason which may have necessitated the amendment to the Pennsylvania act is the fact that the state statute referred to "a commodity which bears, or the label or *content* of which bears . . . the trade-mark, brand . . . ," PA. STAT. ANN. tit. 73, § 7 (Supp. 1959) (emphasis added), whereas the Miller-Tydings Act refers to "a commodity which bears, or the label or *container* of which bears, the trademark, brand . . . ," 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958) (emphasis added). The McGuire Act adopts the Miller-Tydings language. 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(2) (1958). Thus the protection of the fair trade acts is extended only incidentally to the product and primarily to the goodwill represented by the trade name which the product bears. See, *e.g.*, Norman M. Morris Corp. v. Hess Bros., Inc., 243 F.2d 274 (3d Cir. 1957); Burche Co. v. General Elec. Co., 382 Pa. 370, 115 A.2d 361 (1955). This rationale of the fair trade acts was recognized by the Supreme Court in Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936) (upholding constitutionality of nonsigner clauses).

[11] McGuire Act, 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(5) (1958); Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958). See United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); *cf.* PA. STAT. ANN. tit. 73, § 9 (1950).

[12] McGuire Act, 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958); Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958).

Trade Act[13] similarly permits resale price maintenance subject to the requirement that the commodity be "in fair and open competition with commodities of the same general class produced by others . . . ."[14] Neither the Federal Trade Commission nor the courts have been strict in their enforcement of the "free and open competition" limitation. The FTC has invoked the requirement only once: it restrained the Eastman Kodak Company from enforcing resale price maintenance on color film when Kodak was the sole domestic producer of such film.[15] Even this restraining order was dismissed upon the entry of a single competitor into the field.[16] The courts have permitted fair trade even where all major producers in the field follow similar resale price maintenance policies[17] or where the manufacturer enjoys a patent or copyright monopoly on the fair traded commodity.[18] However, the present case's more dynamic application of "fair and open competition" was foreshadowed in *Sinclair Ref. Co. v. Schwartz*,[19] where the same court, refusing to follow the complainant's

[13] PA. STAT. ANN. tit. 73, §§ 7-11 (1950), as amended.

[14] PA. STAT. ANN. tit. 73, § 7 (Supp. 1959).

[15] Eastman Kodak Co., 39 F.T.C. 154 (1944), *modified*, 41 F.T.C. 137 (1945), *aff'd*, 158 F.2d 592 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947). The restraining order was also applicable to magazine film where only Eastman magazines could be used on three major makes of moving picture cameras.

[16] Eastman Kodak Co., 44 F.T.C. 14 (1947). The order remained in force insofar as magazine film was concerned.

[17] Eastman Kodak Co. v. Home Util. Co., 138 F. Supp. 670 (D. Md.), *aff'd in part, modified in part*, 234 F.2d 766 (4th Cir. 1956). "The court therefore reluctantly and with no enthusiasm finds that despite the uniformity of prices and the substantially complete coverage of the field of Eastman fair-traded products by similar fair-traded products, the Eastman . . . products are, within the meaning of the term as employed in the Maryland Fair Trade Act, in free and open competition with products of the same general class." 138 F. Supp. at 677. The restricted scope given to the requirement of free and open competition by the court of appeals in this case is severely criticized in 105 U. PA. L. REV. 415, 416-18 (1957). See Ely Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939), discussed in note 18 *infra*.

[18] *E.g.*, Schill v. Remington Putnam Book Co., 179 Md. 83, 17 A.2d 175 (1941) (copyright); Columbia Records, Inc. v. Goody, 278 App. Div. 401, 105 N.Y.S.2d 659 (1951) (copyright); Ely Lilly & Co. v. Saunders, *supra* note 17 (patent). See Glen Raven Knitting Mills v. Sanson Hosiery Mills, 189 F.2d 845 (4th Cir. 1951) (dictum) (patent). The *Saunders* case is the most extreme example of the courts' refusal to give substance to the free and open competition requirement. Neither the fact that the goods were patented and manufactured by a small number of licensees nor proof that all these licensees fair traded the product within one cent of parity was held to be sufficient to rebut the complainant's allegation that the product was in free and open competition. The court held that free and open competition exists absent proof of an agreement to the contrary and that price parity is no proof of such an agreement inasmuch as the parity "might be the result of close competition as is now the case with the price of gasoline by the major oil companies . . . ." Ely Lilly & Co. v. Saunders, *supra* note 17, at 181, 4 S.E.2d at 540. *But see id.* at 196, 4 S.E.2d at 550 (dissenting opinion). Finally, the court refused to look to the fact that the retailer made a reasonable profit even at cut-rate prices. It distinguished the fair trade field from the antitrust field in that in fair trade the effect on the public is not at issue. As to the question of the public interest in the reasonableness of fair trade prices, this may not be an issue where, as in the *Saunders* case, the attack on fair trade is on constitutional grounds. But where, as in the instant case, the question is whether the resale price maintenance whose enforcement is sought falls within the statutory exception to the antitrust laws, the public policy of the antitrust laws is precisely in point.

[19] 398 Pa. 60, 157 A.2d 63 (1959).

suggestion that it take judicial notice of fair and open competition in the gasoline industry,[20] reversed a preliminary injunction granted over the defendant's denial that such competition existed.[21]

The Pennsylvania Supreme Court, while refusing to join the increasing number of state high courts which have struck down their state fair trade statutes on substantive due process or other constitutional grounds,[22] admits an awareness of the strong economic arguments that fair trade is inimical to a system of competitive free enterprise [23] which is protected and encouraged by antitrust legislation.[24] But rather than employ these economic arguments as grounds for the invalidation of the statute as violative of substantive due process, the court uses them as indications of the legislative intent in including in the fair trade act the requirement of "fair and open competition." [25] Thus, the court reasons that the requirement was designed to guard the public against industry-wide maintenance of noncompetitive prices disguised as a series of unrelated efforts to protect individual product goodwill.[26] And the danger of such price exploitation

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[20] The court, in fact, suggests that the known facts about the gasoline industry might better support judicial notice of the absence of fair and open competition. Sinclair Ref. Co. v. Schwartz, 398 Pa. 60, 63, 157 A.2d 63, 65 (1959).

[21] Compare United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956), which applied a literal reading to the ban on fair trade agreements with firms in horizontal competition with the fair trader despite opposite determinations by the FTC and the state courts in analogous cases. See Eastman Kodak Co., 51 F.T.C. 541 (1955); Eastman Kodak Co. v. Schwartz, 133 N.Y.S.2d 908 (Sup. Ct. 1954).

[22] Burche Co. v. General Elec. Co., 382 Pa. 370, 115 A.2d 361 (1955). For a discussion of the current rash of cases striking down fair trade on constitutional grounds, see Conant, *supra* note 4, at 544-45.

[23] The court cites ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 149-54 (1955), and Herman, *A Note on Fair Trade*, 65 YALE L.J. 23 (1955). There is wide support for the position taken in these works. *E.g.*, Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954); Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621 (1959); Herman, *"Free and Open Competition,"* 9 STAN. L. REV. 323 (1957). The fair trade exception to the antitrust legislation has been maintained, if not brought about, by well-organized pressure groups whose activities have largely evaded the eyes of the public. For a discussion of the means used to achieve passage of fair trade legislation in state legislatures and Congress, see Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 626-27 (1959).

[24] The general antitrust legislation has been viewed as a statement of basic and overriding public policy. See THORELLI, THE FEDERAL ANTITRUST POLICY—ORIGINATION OF AN AMERICAN TRADITION 1-2, 608 (1955); Letter From Franklin Delano Roosevelt to Cordell Hull, Sept. 6, 1944, quoted in THORELLI, *op. cit. supra*, frontispiece. See also United States v. McKesson & Robbins, Inc., 351 U.S. 305, 315-16 (1956). While the movement for antitrust legislation was related to the Granger and Populist movements and was supported in both major party platforms of 1888, the result was obtained by a remarkable grass-roots pressure to "do something about the trusts." THORELLI, *op. cit. supra* at 58-232.

[25] Instant case at 419, 164 A.2d at 659.

[26] Economists argue that, in oligopoly, manufacturers' prices are not unrelated but rather tend toward a uniform high level by virtue of conscious parallel action. See KAYSEN & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 27, 105 (1959). In such a context, resale price maintenance not only transmits this artificially high uniform price to the consumer level but also eliminates "an important source of pressure for independent, competitive, downward price adjustments at the producer level—namely, pressure by retailers whose profit margin has been cut by the competition of other retailers." Schwartz, *New Approaches to the Control of*

of the public requires that the courts insure the satisfaction of the legislative prerequisite despite admissions to this effect by the contending parties.[27]

There are aspects of the present opinion which suggest that, at least in the gasoline industry, manufacturers will find it difficult to prove the existence of the type of competition required by the court's interpretation of the legislative intent. For example, the court looks with apparent approval upon the doctrine of "conscious parallelism," [28] suggesting that a showing of approximate price parity among the major competing brands of gasoline would be "evidence that in fact gasoline is not sold in free and open competition." [29] The opinion further suggests that a manufacturer seeking to enforce resale price maintenance in such a price-parity situation would have to prove "that it is not a party to any agreement or conspiracy to fix prices." [30] The sheer cost of introducing economic evidence to rebut the inference drawn from the fact of parallel pricing and the obvious difficulty of proving the absence (as opposed to the presence) of

Oligopoly, 109 U. PA. L. REV. 31, 41 (1960). The court recognizes the existence of parallel pricing in the oil industry as indicative of the absence of competition and places the burden of proving that such competition does exist in fact upon the party seeking to enforce the stipulated resale price. Instant case at 420, 164 A.2d at 660.

[27] Instant case at 418-19, 164 A.2d at 659. This refusal to follow the normal rules of judicial procedure in the face of the policy of the antitrust laws is not unprecedented. See, *e.g.*, Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249 (1945) (patent law doctrine of estoppel); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) (res judicata); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942) (equity requirement of "clean hands"); United States v. Bethlehem Steel Corp., 157 F. Supp. 877, *subsequent findings and opinion*, 168 F. Supp. 576 (S.D.N.Y. 1958) (summary judgment). See also Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329 (1955) (alternative holding) (res judicata). The *Mercoid* case is particularly analogous to the instant case in that the Court refused to apply the "usual rules governing the settlement of private litigation" in order to protect the public interest in the antitrust policies despite the fact that the government was not a party to the litigation. 320 U.S. at 670.

[28] See Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

[29] Instant case at 420, 164 A.2d at 660.

[30] *Ibid.* The language of the court concerning "conscious parallelism" is somewhat unclear. At one point it refers to price parity as evidence of agreement between those maintaining like prices, at another as evidence of the absence of free and open competition, and at still a third, it takes notice of such parallel pricing and puts the burden on the complainant to prove that it is not a party to a horizontal price-fixing agreement. *Ibid.* The burden which is placed upon the complainant varies greatly depending upon which of these interpretations of "conscious parallelism" is followed. Further, if the court means to treat parallel pricing as evidence of the absence of fair and open competition, the question arises as to whether it will permit rebuttal evidence of nonprice competition; if not, then price parity in itself will be sufficient to prohibit manufacturers from enforcing fair trade in Pennsylvania. The court has suggested that it might look only to price competition to determine whether fair trade may be enforced. Sinclair Ref. Co. v. Schwartz, 398 Pa. 60, 64, 157 A.2d 63, 65 (1959). If the Pennsylvania courts continue to apply the doctrine of "conscious parallelism" to determining fair and open competition in fair trade cases, the oil companies will in all probability attempt to prove fair and open competition, not with the other major producers, but with the sellers of "off-brand" gasoline who maintain a price differential against the "name" brands. This will then raise the question of whether such limited competition is sufficient to satisfy the demands of the fair trade statutes. For evidence that it would in some jurisdictions, see notes 15-18 *supra* and accompanying text. But the thrust of the instant case, and of Sinclair Ref. Co. v. Schwartz, *supra*, suggest that in Pennsylvania, at least, fair and open competition must be effective competition.

a price-fixing agreement [31] might well be sufficient of themselves to discourage future attempts to enforce resale price maintenance.[32]

The court further directs that if the lower court on remand finds that Gulf has satisfied the requirements of the fair trade statutes, then the court must determine "whether a 'non-signer' [in the gasoline industry] can constitutionally be bound to follow fair trade restrictions." [33] In so directing, the court notes that two traditional grounds for upholding the constitutionality of nonsigner clauses seem to be absent when the economic facts of the gasoline industry are analyzed. First, it is unlikely that gasoline would be used as a "loss-leader" [34] inasmuch as most gasoline stations carry but a single brand of gasoline which is their major product.[35] Second, "little argument can be made that the prestige of the trademark or brand is being protected" [36] since, under certain conditions, manufacturers buy and sell each others' gasoline.[37] Under this analysis, there is no apparent

[31] For some suggestion of the complexity of the problems raised in the instant case, see Petition for Reargument, p. 5.

[32] In order to prove "fair and open competition" to the satisfaction of the court in the instant case, the plaintiff oil company which chose to enforce fair trade would be forced to assemble a case similar in size and cost to those common in antitrust suits. It seems questionable that fair trade is valuable enough to any oil company to merit this kind of cost in enforcing it. Nevertheless, the oil companies are planning to introduce expert testimony at retrial and in similar actions to the effect that fair and open competition does exist in the gasoline industry. Interviews With Attorneys for Oil Companies, in Philadelphia, Pa., January 1961. Presumably this effort will also entail the preparation of the extensive brief which would be required to sustain this argument on appeal.

[33] Instant case at 421, 164 A.2d at 660.

[34] For a discussion of the importance given to prevention of "loss leader" selling in urging the enactment of fair trade legislation, see Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621, 628-35 (1959).

[35] See Standard Oil Co. v. United States, 337 U.S. 293 (1949). Moreover, see ROSTOW, A NATIONAL POLICY FOR THE OIL INDUSTRY 72 (1948), for a suggestion that it is at best difficult for a service station to shift its affiliation from one major producer to another.

[36] Instant case at 420, 164 A.2d at 660. The constitutionality of fair trade has been upheld as a device for the protection of the fair trader's goodwill in the product bearing his trade name, particularly against the allegedly detrimental effects of loss-leader selling. See cases cited in note 10 *supra*. Moreover, the substantive due process argument gains additional force in the present case from the fact that other legislative purposes in enacting fair trade—protection of small manufacturers and the safeguarding of independent retailers from the effects of chain store and price war competition—are also inapplicable. See Herman, *supra* note 34, at 635-51, for a discussion of these purposes of fair trade. Since fair trade in the gasoline industry is used primarily by large manufacturers, since retailing in the industry is seldom, if ever, organized along chain store lines, and since price wars can be largely controlled by a refusal by the manufacturers to lower tank wagon prices to the retailers involved, none of these legislative purposes is being furthered by permitting the application of fair trade to this industry. For further evidence that the gasoline industry does not follow a competitive retail price structure suitable for resale price maintenance, see ROSTOW, *op. cit. supra* note 35, at 70-87; for a direct opinion that fair trade would be inappropriate to rational pricing in the gasoline industry, see 3 BAIN, THE ECONOMICS OF THE PACIFIC COAST PETROLEUM INDUSTRY 97-98 (1947).

[37] Among the reasons for such exchange activity in the industry are temporary shortages, wildcat surpluses, and the avoidance of high transportation costs. For evidence of the extent of such exchanges among the major producers, see 1 BAIN, *op. cit. supra* note 36, at 126-27; 3 BAIN, *op. cit. supra* note 36, at 267; ROSTOW, *op. cit. supra* note 35, at 71. Bain also suggests that in California, at least, the major companies buy from minors lacking distribution facilities and sell to affiliates handling

reasonable justification for the subjection of the gasoline retailer to the manufacturer's fair trade pricing, and consequently the application of fair trade to the gasoline industry would violate substantive due process.[38] If no other reasonable justification for applying fair trade to the industry can be found, the lower court must still determine the effect of such a finding. The opinion in the instant case makes it unlikely that the fact that the legislature had reasonable justification for applying fair trade to other industries can be a basis for holding it constitutional as applied to the gasoline industry.[39] On the other hand, it seems unreasonable to strike down the entire statute on a finding that it is unconstitutional in one application.[40] A less drastic remedy is found in Pennsylvania cases which suggest that substantive due process might be used to strike down only a single application of a statute;[41] this would be the most acceptable solution to the dilemma which would otherwise be posed by a finding of unconstitutionality upon remand of the instant case.

RIGHT TO COUNSEL—CODEFENDANT'S GUILTY PLEA BEFORE JURY RAISES PROBLEMS REQUIRING COUNSEL UNDER FOURTEENTH AMENDMENT

Petitioner and two others were tried for robbery in a North Carolina state court. Petitioner, whose request for counsel had been denied, and one other defendant had no counsel at the trial. At the close of the prosecution's case, a third defendant tendered a plea of guilty to the lesser crime of petit larceny. The plea was made in the presence of the jury and was accepted, the trial of the two remaining defendants proceeding to

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the same gasoline as their parent companies under a different name. 1 BAIN, *op. cit. supra* note 36, at 127. These practices, however, bear a close resemblance to ordinary subcontracting or the production of private brands for large suppliers, which have not heretofore been used by the courts as grounds for forbidding the use of fair trade.

[38] Substantive due process continues a lively, if fitful, existence in Pennsylvania. *E.g.*, Lutz v. Armour, 395 Pa. 576, 151 A.2d 108 (1959); Commonwealth *ex rel.* Woodside v. Sun Ray Drug Co., 383 Pa. 1, 16-17, 116 A.2d 833, 840-41 (1955); Cott Beverage Corp. v. Horst, 380 Pa. 113, 110 A.2d 405 (1955); Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954); Hertz Drivurself Stations, Inc. v. Siggins, 359 Pa. 25, 58 A.2d 464 (1948). *Contra*, Best v. Zoning Board of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958); Bilbar Constr. Co. v. Easttown Township Board of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958); Maurer v. Boardman, 336 Pa. 17, 7 A.2d 466 (1939), *aff'd sub nom.* Maurer v. Hamilton, 309 U.S. 598 (1940).

[39] Compare Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955) ("but the law need not be in every respect logically consistent with its aims to be constitutional").

[40] *But see* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 96-97 (1960).

[41] See Commonwealth *ex rel.* Woodside v. Sun Ray Drug Co., 383 Pa. 1, 116 A.2d 833 (1955) (*semble*); Cott Beverage Corp. v. Horst, 380 Pa. 113, 110 A.2d 405 (1955).

its conclusion.[1] At no time did the trial judge instruct the jury to disregard the third defendant's guilty plea in determining petitioner's guilt. Both petitioner and his remaining codefendant were found guilty of larceny from the person, a felony under North Carolina law. After a full hearing of petitioner's claim that he had been denied due process of law guaranteed him by the fourteenth amendment, a special state court dismissed an application for relief under the North Carolina Post-Conviction Hearing Act.[2] The state supreme court refused to review, but, on certiorari, the Supreme Court of the United States reversed this denial of post-conviction relief. Accepting the findings of the post-conviction hearing judge, the Court stated that this "is not a case where it can be said that the failure to appoint counsel for the defendant resulted in a constitutionally unfair trial either because of deliberate overreaching by court or prosecutor or simply because of the defendant's chronological age."[3] The Court held, however, that prejudice resulting from a codefendant's plea of guilty in the jury's presence and the failure of the trial judge to give cautionary instructions made this a case where denial of counsel deprived the defendant of fourteenth amendment due process of law: "The prejudicial position in which the petitioner found himself when his codefendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman's ken."[4] *Hudson v. North Carolina,* 363 U.S. 697 (1960).

The federal constitution's fourteenth amendment has not been construed to give indigent criminal defendants in state courts an absolute right to have counsel appointed in noncapital cases.[5] A federal right to state-

[1] During the direct testimony of the prosecution's first witness, the attorney for the third codefendant offered to represent all three defendants "as long as their interests don't conflict." He did so, in effect, until the conclusion of the state's case, withdrawing when the guilty plea tendered on behalf of his client was accepted. Hudson v. North Carolina, 363 U.S. 697, 698-99 (1960).

[2] N.C. GEN. STAT. §§ 15-217 to -222 (1953).

[3] Hudson v. North Carolina, 363 U.S. 697, 701-02 (1960). Although the petitioner was an eighteen-year-old youth with only a sixth grade education, he had a previous criminal record, *id.* at 701, and prior courtroom trial experience, *id.* at 707 (dissent). The Court specifically distinguished the case from Wade v. Mayo, 334 U.S. 672 (1948), where the petitioner's youth and inexperience were significant factors in holding the denial of counsel to be a denial of due process. See notes 9 and 10 *infra* and accompanying text.

[4] Hudson v. North Carolina, 363 U.S. 697, 703-04 (1960). The Court had pointed out that "a layman would hardly be aware of the fact that he was entitled to any protection from the prejudicial effect of the codefendant's plea of guilty. Even less could he be expected to know the proper course to follow in order to invoke such protection." *Id.* at 703.

[5] "[W]e are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case." Betts v. Brady, 316 U.S. 455, 471 (1942). Whether or not invalidating a conviction, the Court has repeatedly failed to repudiate this doctrine. See Cash v. Culver, 358 U.S. 633 (1959); Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951); Quicksall v. Michigan, 339 U.S. 660 (1950); Gibbs v. Burke, 337 U.S. 773 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Townsend v. Burke, 334 U.S. 736 (1948); Gryger v. Burke, 334 U.S. 728 (1948); Wade v. Mayo, 334 U.S.

provided counsel arises only when the circumstances indicate that a fundamentally unfair trial may otherwise result.[6] And determining whether "fundamental fairness" was lacking in a state criminal proceeding has necessitated "appraisal of the totality of facts in a given case," the test articulated in *Betts v. Brady*.[7] Each state conviction declared to have fallen short of this fundamental fairness standard has added a specific factor of which states need beware lest its presence be the basis of successful constitutional attack on future convictions. Past cases in which the Supreme Court has declared state convictions invalid in the absence of counsel have established unconstitutionally prejudicial factors, several often being present in any given case,[8] which fall into three basic categories—the nature of the defendant, the nature of the crime, and factors unrelated to the nature of the defendant or the crime. Going to the nature of the defendant are those cases where his youth,[9] inexperience,[10] insanity,[11] or

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672 (1948); Bute v. Illinois, 333 U.S. 640 (1948); Marino v. Ragen, 332 U.S. 561 (1947); Foster v. Illinois, 332 U.S. 134 (1947); DeMeerleer v. Michigan, 329 U.S. 663 (1947); Carter v. Illinois, 329 U.S. 173 (1946); Canzio v. New York, 327 U.S. 82 (1946); Rice v. Olson, 324 U.S. 786 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945); Williams v. Kaiser, 323 U.S. 471 (1945). Although there are no cases explicitly holding that state courts are required to appoint counsel in capital cases, such appears to be the rule recognized by the Court. In Bute v. Illinois, *supra*, the Court said: "The final question is . . . whether . . . the provision requiring due process of law under the Fourteenth Amendment, in and of itself, required the [state] court . . . to assign competent counsel to the accused to conduct his defense. We recognize that, if these charges had been capital charges, the court would have been required . . . by . . . the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps." *Id.* at 674 (dictum). "[A] state may refuse to furnish counsel even when needed by the accused in serious felonies other than capital." Gibbs v. Burke, 337 U.S. 773, 780 (1949) (dictum). See Tomkins v. Missouri, *supra*; Williams v. Kaiser, *supra*. These two cases are unclear as to whether decision rested on the technical nature of the charge or on the fact that the offense carried a capital penalty. See note 24 *infra*. The origin of the rule in regard to capital offenses seems to be Powell v. Alabama, 287 U.S. 45 (1932).

[6] "[T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Betts v. Brady, 316 U.S. 455, 473 (1942).

[7] 316 U.S. 455, 462 (1942). See cases cited note 5 *supra*.

[8] See, *e.g.*, Moore v. Michigan, 355 U.S. 155 (1957) (youth, inexperience, insanity, technical charges and defenses); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956) (youth, inexperience, technical charges); Tomkins v. Missouri, 323 U.S. 485 (1945) (capital offense and technical charges).

[9] Moore v. Michigan, *supra* note 8; Pennsylvania *ex rel.* Herman v. Claudy, *supra* note 8; Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Mayo, 334 U.S. 672 (1948); Marino v. Ragen, 332 U.S. 561 (1947); DeMeerleer v. Michigan, 329 U.S. 663 (1947).

[10] Moore v. Michigan, 355 U.S. 155 (1957) (limited education); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956) (inexperience with "criminal procedure"; limited education); Uveges v. Pennsylvania, *supra* note 9 (inexperience with "criminal procedure"); Wade v. Mayo, *supra* note 9 (inexperience with "Court procedure"); Marino v. Ragen, *supra* note 9 (inexperience with "trial court procedure").

[11] Moore v. Michigan, *supra* note 10; Massey v. Moore, 348 U.S. 105 (1954). The Court has made no effort to draw distinctions between insanity and mental abnormality. See Palmer v. Ashe, 342 U.S. 134 (1951). Nor would such a distinction seem helpful.

mental abnormality[12] have rendered the trial or plea without counsel fundamentally unfair. The nature of the crime has been the common denominator of cases where reversal for lack of counsel turned on the technicality of the charges[13] or defenses[14] or the seriousness of the crime.[15] The third category—factors unrelated to the nature of the defendant or the crime—has encompassed cases where there was either deliberate or careless overreaching by the court or prosecutor[16] or where incidents at trial[17] or sentencing[18] have prejudiced the defendant. In some cases, the total effect of the prejudicial incidents has descended to the level of overreaching;[19] in others, events not clearly amounting to overreaching were involved. Thus, in one case, the problems giving rise to unfairness resulted directly from the prosecutor's manner of presentation—that is, the state's mere introduction of accomplice testimony created problems beyond the "ken of a layman"[20] in that the lawyerless defendant lost three state-law-provided opportunities to impeach the accomplice's credibility.[21]

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[12] Palmer v. Ashe, *supra* note 11 (alternative holding).

[13] Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); DeMeerleer v. Michigan, 329 U.S. 663 (1947). See Tomkins v. Missouri, 323 U.S. 485 (1945); Williams v. Kaiser, 323 U.S. 471 (1945). It is unclear whether these last two convictions were invalidated because the offense was capital or because the charges were technical; the Court appeared to put greater emphasis in both its opinions on the capital nature of the penalty. For a discussion of specific technical charges and defenses which have been factors in invalidations of state convictions, see notes 24 and 25 *infra*. In all cases in which technical charges and defenses were involved, the defendant had pleaded guilty; his conduct of a defense at trial, consequently, was not in issue. See notes 14, 24, and 25 *infra*.

[14] Moore v. Michigan, *supra* note 13; Rice v. Olson, 324 U.S. 786 (1945).

[15] Implicit in all the appointment-of-counsel opinions of the Court has been the idea that the crime charged be a serious one. How serious the crime must be to invoke the due process clause in cases where counsel has been denied seems never to have been in issue, but in all the cases where a conviction has been declared invalid the crime has been one commonly considered a felony.

[16] Gibbs v. Burke, 337 U.S. 773 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Palmer v. Ashe, 342 U.S. 134 (1951) (alternative holding); White v. Ragen, 324 U.S. 760 (1945) (dictum). In Marino v. Ragen, 332 U.S. 561 (1947), the youth, inexperience with court procedure, and lack of understanding of the language—in addition to several irregularities—added up to such flagrant overreaching that the state's attorney general confessed error and consented to reversing the state's denial of a writ of habeas corpus. In Lutz v. Ragen, decided with White v. Ragen, *supra*, witnesses were bribed by the prosecutor to give false testimony in a murder trial.

[17] Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, *supra* note 16.

[18] Townsend v. Burke, 334 U.S. 736 (1948).

[19] Gibbs v. Burke, 337 U.S. 773 (1949); Townsend v. Burke, *supra* note 18. See note 22 *infra*.

[20] Cash v. Culver, 358 U.S. 633, 638 (1959). The Court used similar language in the instant case at 704. See text accompanying note 4 *supra*.

[21] Cash v. Culver, *supra* note 20. The case involved the retrial without benefit of counsel of a twenty-year-old farm boy for burglary after the first trial—in which he was represented by counsel—ended with a hung jury. The defendant was convicted, primarily if not solely, on the testimony of an alleged accomplice. Under the pertinent state law, the defendant had "a right to demand that the trial judge instruct the jury that the 'evidence of an accomplice should be received by the jury with great caution.'" *Id.* at 637. The defendant also had, under state law, the "right to cross-examine an accomplice witness as to whether he is testifying under

A codefendant's guilty plea before the jury was added by the instant case to the factors against which a state court must guard in the absence of defense counsel to avoid reversal on due process grounds. Unlike most of the elements leading to reversal in the past, this mid-trial guilty plea could not have been foreseen prior to trial. With the exception of those cases involving overreaching,[22] all of the factors which have led to reversal have been assessable before the proceedings—the shortcomings of the defendant[23] and the technicalities of the charges[24] or defenses[25] easily

an agreement for leniency, and even as to whether he believes that his testimony will be in his best interest." *Id.* at 637-38. The defendant had not taken advantage of these rights. Moreover, the accomplice testified concerning the commission of other crimes by the defendant and the commission of a crime by the defendant's brother who allegedly also participated in the burglary which was the subject of the trial. This testimony, "if not inadmissible in its entirety, certainly raised serious questions under Florida law. As the Florida Supreme Court has recently noted, 'There are literally thousands of cases in this country discussing the admission of such evidence.'" *Id.* at 638. The Court also pointed out that "the transcript of the petitioner's previous trial would have offered a lawyer opportunities for impeachment of prosecution witnesses, opportunities of which we cannot assume that a layman would be aware." *Ibid.*

[22] Gibbs v. Burke, 337 U.S. 773 (1949); Townsend v. Burke, 334 U.S. 736 (1948). In *Gibbs,* the Court concluded that the defendant had been prejudiced by a series of incidents at the trial: hearsay and other incompetent evidence was admitted; the prosecuting witness was ruled the defendant's witness when the defendant cross-examined him, although the Pennsylvania rule seemed to be that an adverse witness can be so examined without his testimony becoming binding on the cross-examining defendant; the defendant was prevented from proving that the prosecuting witness had previously made a baseless criminal charge against him under similar circumstances; and the judge made reference to possible prior convictions in the presence of the jury. While the Court disclaimed its pertinency to the prejudice-at-trial problem before it, the trial judge also had used language when sentencing which evinced a hostile and unjudicial attitude. In *Townsend,* the prejudice occurred when, at sentencing, either the trial judge carelessly misread the defendant's prior criminal record or the prosecutor submitted misinformation to the court about the prior record. In addition, the trial judge made facetious remarks about the defendant's behavior and record.

[23] See notes 9-12 *supra* and accompanying text.

[24] For example, in Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956), the petitioner pleaded guilty to eight charges of burglary, twelve of larceny, eight of forgery, and two of false pretense. The conviction may have been reversed either because the defendant was young and inexperienced or because the "number and complexity of the charges against petitioner, as well as their seriousness, create a strong conviction that no layman could have understood the accusations and that petitioner should, therefore, have been advised of his right to be represented by counsel." *Id.* at 122. It was also alleged that a confession had been coerced and that its existence was a factor in the defendant's decision to plead guilty. In De Meerleer v. Michigan, 329 U.S. 663 (1947), the offense charged was murder, a noncapital offense in Michigan. Here the opinion did not make clear whether reversal was based on defendant's youth and inexperience or on the fact that the technical nature of the crime made the case one in which any defendant would have been prejudiced without counsel. In Tomkins v. Missouri, 323 U.S. 485 (1945) (murder), and Williams v. Kaiser, 323 U.S. 471 (1945) (robbery), the offense charged was highly technical and carried a capital penalty. In these two cases the opinions are unclear as to whether decision rested on the capital aspect or on the fact that there were various degrees to both offenses and that lesser crimes were included in the offense charged.

[25] In Moore v. Michigan, 355 U.S. 155 (1957), the technical defenses to murder (a noncapital offense in Michigan)—insanity, mistaken identity, degrees of the crime—grounded invalidation of the conviction. In Rice v. Olson, 324 U.S. 786 (1945), there was a possible defense that the state court lacked jurisdiction to try an Indian for burglary committed on a federal reservation; the technicality of this defense was clearly beyond the ken of a layman, and its existence was sufficient to nullify the defendant's guilty plea in the absence of counsel.

can be evaluated prior to trial or plea and the attendant problems prepared against by appointment of counsel.[26] Even in the accomplice testimony case,[27] the problems consequent to the prosecutor's presenting such a witness could have been foreseen.[28] While ability to foresee a particular need for counsel has never been a criterion of due process,[29] the Court's decisions have in fact laid down some guidelines whereby a state can anticipate on a case-by-case basis the necessity for counsel.[30] Reversing for the single error in the present case makes clear that a state court's acting on those previously defined guidelines, even in the absence of overreaching, is not sufficient to insulate its results from successful constitutional attack. The decision, however, still is not a mandate by the Court that counsel be appointed in all cases;[31] it continues to leave to the state the alternative of appointing counsel on an *ad hoc* basis. A state finding appointment in all cases unsatisfactory can avoid federal reversal[32]—even

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[26] While overreaching cannot be anticipated prior to trial, such taking advantage of defendants is not an activity in which the state may engage even when the defendant is represented by counsel. See Alcorta v. Texas, 355 U.S. 28 (1957). It is true, nevertheless, that the Court would be more likely to find overreaching when a defendant is not represented than when he has legal assistance. See note 22 *supra*.

[27] Cash v. Culver, 358 U.S. 633 (1959).

[28] The case warns that in some proposed case presentations, not yet fully defined, there may inhere peculiar dangers of unconstitutional prejudice to the lawyerless defendant. The possible legal problems which such accomplice testimony could create make the case somewhat analogous to those cases in which there were technical defenses. See note 25 *supra*.

[29] "Respondent argues that to hold to such precedents leaves the state prosecuting authorities uncertain as to whether to offer counsel to all accused who are without adequate funds and under serious charges in state courts. We cannot offer a panacea for the difficulty. Such an interpretation of the Fourteenth Amendment would be an unwarranted federal intrusion into state control of its criminal procedure. The due process clause is not susceptible of reduction to a mathematical formula." Gibbs v. Burke, 337 U.S. 773, 780-81 (1949).

[30] Even in the instant case there is a minor element of predictability: perhaps inherent in the trial of multiple defendants is a possible mid-trial guilty plea by one seeking leniency. Likewise, other conflicting interests between the defendants may develop. It would be difficult, however, to confine the holding merely to multiple-defendant trials; if it could be thus confined, the case would not differ measurably in its foreseeable consequences from its immediate predecessor, Cash v. Culver, 358 U.S. 633 (1959), where the prosecutor's introduction of accomplice testimony gave rise to problems requiring legal advice. Of course, the impact of the prejudicial error in each case on federal due process is the same; *Cash* was one of two cases the Court cited specifically for its present holding.

[31] Mr. Justice Clark, whom Mr. Justice Whittaker joined in dissent, characterized the Court's opinion as cutting "serious inroads into . . . [the] holding [of *Betts v. Brady*]." Instant case at 704 (dissent). However, the holding of *Betts* that an indigent defendant has no absolute right to counsel leaves considerable room for requiring counsel where there is demonstrable prejudice resulting from the trial court's conduct of the proceedings. It is the dissent's finding no prejudice in the instant case which leads it to conclude that the Court touches the holding of *Betts*. Mr. Justice Clark, in fact, uses language similar to that in *Betts* when describing the simplicity of the defense before the Court. *Compare* instant case at 707 (dissent), *with* Betts v. Brady, 316 U.S. 455, 472 (1942).

[32] Avoidance of federal invalidation is not an inconsiderable concern of the state judicial and prosecuting authorities. See Reitz, *Federal Habeas Corpus: Postconviction Remedy For State Prisoners*, 108 U. PA. L. REV. 461, 515 n.314, 516 & n.320 (1960).

in trials where prejudice was not foreseen—by closely scrutinizing the proceedings, either avoiding prejudicial errors during trial[33] or granting a remedial new trial when such errors are belatedly recognized. The present case, however, does not define what error is of sufficient magnitude to require such preventive or corrective measures. A broad reading of the decision would indicate that any error is sufficient which would merit reversal in the state courts if properly objected to and raised in regular appellate proceedings;[34] a narrower interpretation would require something more than mere reversible error—perhaps even an incident so prejudicial that it could be remedied, at any stage, only by retrial.[35] Whatever error may offend the Court's due process standards, the state is under an apparent and not inconsiderable burden to conduct for the lawyerless defendant an especially careful trial.[36]

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[33] The trial judge "may guide a defendant without a lawyer past the errors that make trials unfair." Gibbs v. Burke, 337 U.S. 773, 781 (1949) (dictum). See Uveges v. Pennsylvania, 335 U.S. 437, 442 (1948) (dictum).

[34] In this respect the Court noted that, while North Carolina had never actually held a guilty plea not cured by instructions cause for reversal, the state had recognized its prejudicial effects. Instant case at 702-03. The incident in the instant case was not placed before the North Carolina Supreme Court for ordinary, nonconstitutional review because the petitioner's appeal was dismissed for want of prosecution at the trial court level. Record, p. 58. He had failed to perfect his appeal as ordered by the trial court within the time prescribed. Record, pp. 57-58. If mere reversible error by state standards were considered unconstitutionally prejudicial in the absence of counsel, the instant case might properly be viewed as cutting inroads into *Betts v. Brady* and its progeny, cases cited note 5 *supra*. See note 31 *supra*. See Gryger v. Burke, 334 U.S. 728, 731 (1948), where the Court said: "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." See generally *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 135-37 (1960).

[35] The Court noted that a North Carolina decision expressed the view that even a positive instruction might not cure the prejudice resulting from a codefendant's guilty plea before the jury. Instant case at 703. Assuming the prejudice resulting from such a plea is curable, the precise course to be followed by a North Carolina trial court is unclear. *Id.* at 702. The majority and dissent disagree as to the status of North Carolina law in regard to curative instructions and as to the weight to be given to such uncertainty. The majority believed that "the very uncertainty of the North Carolina law in this respect serves to underline the petitioner's need for counsel to advise him." *Id.* at 703. The dissent thought that the North Carolina cases cited by the majority did not support its theory that failure to give curative instructions is prejudicial. In any event, concluded the dissent, lack of counsel at this juncture was not prejudicial because not once since the defendant was provided with counsel had any of the attorneys urged the handling of the guilty plea as the error necessitating reversal. *Id.* at 705-06 (dissent). See note 31 *supra*.

[36] Note that under a stringent standard the lawyerless defendant might in some instances be more fortunate than a defendant whose counsel fails to invoke proper state remedies. In the instant case, the codefendant's mid-trial guilty plea was never pressed as a reason for invalidating the conviction even when counsel were obtained for the collateral attack proceedings. Instant case at 706 (dissent). The guilty plea, even before the Supreme Court, was mentioned only in the recital of facts in the petitioner's brief. Instant case at 704 (dissent).

UNFAIR COMPETITION—Reduction of Commission by Seller's Broker To Enable Seller To Reduce Price to a Particular Buyer Constitutes an Allowance in Lieu of Brokerage Within Robinson-Patman Act Section 2(c)

Seller's broker, in order to obtain a large sale, reduced his usual brokerage fee to enable the seller to sell at a price demanded by the buyer.[1] The resulting price per unit was lower than that at which the seller sold to other buyers. The Federal Trade Commission charged that the broker's reduction of the usual fee to his principal was in effect an indirect payment of part of his commission to the buyer and thus violated section 2(c) of the Robinson-Patman Act, which prohibits "any person" from making "an allowance in lieu of brokerage" to the other party to a transaction.[2] The broker was ordered to cease and desist from negotiating sales on this basis. The Seventh Circuit set aside the Commission's order, holding that the conduct of a seller's broker is not encompassed by section 2(c) and that, in any event, since the broker reduced his charge only to the seller, he had not paid or granted anything to the buyer.[3] The Supreme Court, reversing, held that the prohibition of section 2(c) is applicable to an independent seller's broker and that the broker grants to the buyer "an allowance in lieu of brokerage" when he reduces his usual commission rate to enable the seller to make a sale at a special price to a buyer who is not shown to deserve favored treatment.[4] *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

The purpose of the Robinson-Patman Act—to prevent large buyers from obtaining price advantages solely by virtue of their purchasing power [5]

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[1] The seller's standard price was $1.30 per unit. When the buyer remained firm in offering to purchase only at $1.25, the broker agreed with the seller to reduce his brokerage commission from a contracted 5% to 3%. This amounted to one-half of the price reduction which the buyer received, the other half being absorbed by the seller.

[2] Section 2(c) reads: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1958).

[3] Henry Broch & Co. v. FTC, 261 F.2d 725 (7th Cir. 1958).

[4] While the instant case did not involve a direct buyer, the Court thought it indistinguishable in principle from a number of Commission rulings that § 2(c) is violated when a direct buyer receives a discount equal to the brokerage fees saved. However, in footnote, FTC v. Henry Broch & Co., 363 U.S. 166, 177 n.19 (1960), the Court takes care not to extend its present ruling to these direct-buyer cases not before it: "We need not view . . . [the Commission's rulings] as laying down an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers for here . . . the 'savings' in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment."

[5] Both the Senate and the House judiciary committees explained the brokerage section as an attempt to cope with large buyers. The House committee said: "[W]hen free of the coercive influence of mass buying power, discounts in lieu of

—is embodied in section 2(a)'s prohibition of discriminatory price reductions not justified by cost savings derived from dealing with the buyer who receives the lower price.[6] However, any price concession given in the form of a brokerage payment or an allowance in lieu of such payment is absolutely prohibited by section 2(c).[7] Brokerage payments and allowances need not be discriminatory to fall within this section,[8] and they cannot be cost justified on grounds that the buyer performed, or relieved the seller from performing, brokerage services which are normally an expense to the seller.[9]

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brokerage are not usually accorded to buyers who deal with the seller direct since such sales must bear instead their appropriate share of the seller's own selling cost. Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatable with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest." H.R. REP. No. 2287, 74th Cong., 2d Sess., pt. 1, at 15 (1936). To the same effect is S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

[6] The pertinent portion of § 2(a) states: "That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958). The burden of proving justification under the § 2(a) proviso is placed on the defendant by § 2(b), 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).

[7] *E.g.*, Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

[8] See AUSTIN, PRICE DISCRIMINATION 107 (2d rev. ed. 1959): "Section 2(c) is the only section of the Robinson-Patman Act the prohibitions of which do not deal with discrimination, either in price, allowances, services or facilities." However, the author notes: "While discrimination is not an element of the offense, it is ordinarily necessary in direct dealing cases to show that the seller sold to other customers through brokers and the prices charged, in order to prove that the rebate or discount to the buyer was in fact in the nature of brokerage or in lieu thereof. On the other hand, if a commission is paid to an agent or controlled intermediary of a single buyer no other proof is necessary." *Id.* at 108 n.209. See, *e.g.*, Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Ramsdell Packing Co., 32 F.T.C. 1187 (1941); Albert W. Sisk & Son, 31 F.T.C. 1543 (1940). In FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960), where seller in one sale reduced brokerage fee 3% and passed this reduction on in the form of a 3% price discount to buyer, the court held the evidence sustained a finding that the discount was in lieu of brokerage. And in Main Fish Co., 53 F.T.C. 88, 89 (1956), the Commission stated: "If respondent has paid to Pacific a commission or brokerage . . . , or if it has granted an allowance, discount or other compensation in lieu of brokerage, then respondent has violated subsection (c) . . . and a cease-and-desist order should issue. The sole issue in this proceeding is whether or not respondent extended net prices, allowances or discounts to Pacific as, or in lieu of, brokerage. The issue is one of fact, not law."

[9] Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940). That savings in brokerage, which can be a large part of distribution cost, cannot be passed on to buyers as true cost savings has been criticized on grounds that, since the underlying purpose of the Robinson-Patman Act is to

The per se illegality[10] of such payments and allowances is based on a congressional judgment that they are peculiarly subject to abuse as a means for giving unjustified price preferences.[11] The FTC and the courts of appeals have not interpreted section 2(c) to prohibit only payments or allowances claimed to be brokerage by the parties to the transaction,[12] but

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preserve competition, conduct should not be adjudged illegal without consideration of its effect on competition. See, *e.g.*, Rowe, *Price Discrimination, Competition, and Confusion*, 60 YALE L.J. 929, 960-61 (1951). See also ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 191-92 (1955): "[T]he Committee disapproves the present disparity in the statutory consequences which attach to economically equivalent business practices. Today, 'direct' or 'indirect' price discriminations under Section 2(a) do not transgress the law unless they cause adverse market effects and unless unjustifiable under one of the defensive provisos. In contrast, 'brokerage' concessions . . . are illegal *per se*. This legal quirk facilitates manipulation and fosters confusion, since the Act places a premium on cloaking any concession in terms of a desired legal result."

[10] "Illegal per se" in reference to § 2(c) means that the defendant's guilt or innocence is a question of fact, and no defenses are available once it has been established that an illegal brokerage has been paid. See, *e.g.*, Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Oliver Bros., Inc. v. FTC, 102 F.2d 763 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 188-89, 191 (1955). *Cf.* Main Fish Co., 53 F.T.C. 88, 89 (1956). For criticism of this "per se" approach, see AUSTIN, *op. cit. supra* note 8, at 122; ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 191-92 (1955); Oppenheim, *Should the Robinson-Patman Act Be Amended?*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 141, 145 (1948); Rowe, *How To Comply With Sections 2(c)-(f)*, in N.Y. ST. BAR ASS'N, SYMPOSIUM—HOW TO COMPLY WITH THE ROBINSON-PATMAN ACT 124, 133-34 (1957); Rowe, *supra* note 9, at 960-61.

[11] See, *e.g.*, Webb-Crawford Co. v. FTC, 109 F.2d 268, 269 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940) ("The congress considered the effect on commerce of the things named in subsection (c), and absolutely prohibited them"); Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511, 535 (1940). Biddle Purchasing Co. v. FTC, 96 F.2d 687, 692 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938), advanced the additional argument that § 2(c) was designed to prevent hidden concessions, and that "one of the main objectives of section 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers." Practically, this would not only tend to dissuade the giving of unlawful price discriminations, but also would enable the self-policing feature of the act to become effective, inasmuch as the injured competitor can institute treble-damage proceedings or inform the FTC. There are indications in the Seventh Circuit's opinion in the instant case that a broker competing with the respondent pointed out Broch's conduct to the FTC. Henry Broch & Co. v. FTC, 261 F.2d 725, 728 (7th Cir. 1958).

[12] The proscription of § 2(c) is outlined in Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945) (buyer prohibited from receiving a brokerage payment or discount in lieu thereof from the seller); Fitch v. Kentucky-Tenn. Light & Power Co., 136 F.2d 12 (6th Cir. 1943) (corporate president as agent for the buyer corporation prohibited from receiving brokerage commissions from seller); Webb-Crawford Co. v. FTC, 109 F.2d 268 (5th Cir.), *cert denied*, 310 U.S. 638 (1940) (buyer's agent prohibited from receiving commissions from the seller); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940) (buyer's agent prohibited from receiving brokerage commissions from seller and passing them on to the buyer); Oliver Bros., Inc. v. FTC, 102 F.2d 763 (4th Cir. 1939) (buyer prohibited from receiving a discount or payment for services rendered to the seller); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938) (buyer's agent prohibited from receiving payment of brokerage for services rendered to the seller). Also note that, where a payment or allowance in lieu of brokerage is made, a complaint may be issued against any or all parties to the transaction. "The Commission has followed no consistent pattern in this respect. None of the parties to a transaction falling under the ban of Section 2(c) may safely assume that a Commission complaint, if issued, will be against the other party or parties." AUSTIN, *op. cit. supra* note 8, at 116.

rather have broadly construed the section to encompass any price reduction based on savings in brokerage fees realized from selling directly to a particular buyer [13] or from the seller's having paid a lower commission to his broker on a particular sale.[14] In the present case—the first section 2(c) violation before the Supreme Court—the majority endorsed this broad interpretation by sanctioning the definition of an allowance in lieu of brokerage in terms of the result of given conduct rather than in terms of the label attached to it.

The Court unanimously agreed in the instant case that a seller's broker came within the "any person" provision of section 2(c).[15] It was to the conduct proscribed rather than to the party charged that the four dissenting Justices objected. The dissenters argued against rendering illegal per se discriminatory broker's fee reductions passed on to buyers; they believed that such reductions should be tested only under section 2(a), which would, in their view,[16] permit the discount to be justified by cost savings.

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[13] Cease and desist orders have issued against buyers in Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); A. Krasne, Inc., 34 F.T.C. 121 (1941); R. C. Williams & Co., 33 F.T.C. 1182 (1941); UCO Food Corp., 33 F.T.C. 924 (1941); Giant Tiger Corp., 33 F.T.C. 830 (1941); General Grocer Co., 33 F.T.C. 377 (1941); and against sellers in Union Malleable Mfg. Co., 52 F.T.C. 408 (1955); Ramsdell Packing Co., 32 F.T.C. 1187 (1941).

[14] Ramsdell Packing Co., 32 F.T.C. 1187 (1941). Neither the majority nor the dissent in the instant case recognized that *Ramsdell* dealt with the same conduct proscribed in the instant case. In addition to prohibiting a discount based on elimination of brokers' fees, for which proposition both sides of the Court cited the case, *Ramsdell* prohibited a discount based on reduced brokers' fees. The only distinction between the cases is that the seller was prosecuted in *Ramsdell* and the broker in *Broch*, a distinction which both sides of the court had dismissed for purposes of § 2(c). In FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960), decided while the instant case was in the process of litigation, a seller was successfully charged under § 2(c) for giving a discount to a particular buyer corresponding to a special reduction in the fee of the seller's broker. See note 8 *supra*. The *Washington Fish & Oyster* court in an earlier opinion on a motion, while distinguishing the Seventh Circuit's opinion in the instant case on the seller-broker distinction there espoused, indicated disapproval of its holding on what constitutes an allowance in lieu of brokerage. 271 F.2d 39, 43, 44 (9th Cir. 1959) (dictum). Doubt was also expressed as to the intermediate court's disposition of the instant case in Robinson v. Stanley Home Prods., Inc., 272 F.2d 601, 602 n.1 (1st Cir. 1959) (dictum).

[15] 363 U.S. at 170 (majority opinion), 179 (dissenting opinion). The Brief for Appellant, p. 20 n.6, FTC v. Henry Broch & Co., 363 U.S. 166 (1960), cited a number of cases in which a seller's broker was prosecuted: Custom House Packing Corp., 43 F.T.C. 164 (1945) (cease and desist order entered on consent); D. J. Easterlin & Co., 33 F.T.C. 1639 (1941) (case dismissed; practices had been discontinued); W. E. Robinson & Co., 32 F.T.C. 370 (1941) (seller's broker ordered to cease and desist from allowing brokerage fees to buyers). Subsequent to the complaint in the instant case, the FTC issued a number of complaints charging seller's brokers with violating § 2(c). "While there have not been many cases prior to the instant one in which the Commission proceeded under § 2(c) against a seller's broker, the significant fact is that it did initiate such a case shortly after the Act was passed, and that it has consistently adhered to the view that the Act does cover such persons." Brief for Appellant, p. 20 n.6, FTC v. Henry Broch & Co., 363 U.S. 166 (1960). See Oppenheim, *supra* note 11, at 544.

[16] The majority, on the other hand, does not have to reach the question of whether savings in brokerage, qua brokerage, could ever be a cost justification for a price discount under § 2(a). It is implicit in the decision, however, that § 2(c)'s absolute proscription of brokerage allowances to a buyer negatives any cost justification under § 2(a) for discriminatory reduction or elimination of brokerage fees

To remove the conduct of the instant case from section 2(c), the dissent contended that, since it was never claimed by seller, broker, or buyer that the broker's reduction in commission to the seller was based on any savings in brokerage resulting from the buyer's performing brokerage services, the broker's discount to his own principal was not a section 2(c) "allowance in lieu of brokerage." [17] But claims by sellers, brokers, and buyers cannot be determinative of whether section 2(c) has been violated.[18] To make illegality turn on the parties' characterization of the transaction would put the FTC in the curious position of permitting a defendant, by virtue of what he claims or does not claim, to exclude himself from the operation of the section. Obviously, only the most unsophisticated would couch their agreement in terms descriptive of that which the act specifically prohibits.[19] It was sufficient for the majority that the discriminatory [20] reduction in brokerage commission and the consequent [21] price reduction to a preferred buyer were not shown to have been justified by a different method of dealing with that buyer.[22] By sanctioning the application of section 2(c) to

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leading to a price discount. Under such a view of the § 2(a) cost justification proviso and its relationship to brokerage, the result in the instant case would be the same, for the majority, whether the conduct was charged under § 2(c) or § 2(a). Consequently, the majority subscribes to the Commission's practice of bringing the charge under § 2(c), retaining the body of law already built up around that section in regard to the discriminatory elimination of brokerage. See cases cited note 13 *supra*. One effect of the decision is to avoid construing § 2(a) in future cases to encompass charges against brokers as well as sellers. See note 6 *supra*. The dissent objects, of course, not only to bringing brokerage fee reductions under § 2(c) but also to the Commission's practice of similarly charging the elimination of brokerage. Instant case at 185 n.10 (dissent).

[17] Instant case at 180, 182-83 (dissent).

[18] Compare FTC v. Washington Fish & Oyster Co., 282 F.2d 595, 598 (9th Cir. 1960).

[19] See Rowe, *How To Comply With Sections 2(c)-(f)*, in N.Y. ST. BAR ASS'N, SYMPOSIUM—HOW TO COMPLY WITH THE ROBINSON-PATMAN ACT 124, 131-36 (1957).

[20] While a finding of discrimination is not necessary to a finding of violation of § 2(c), it may be a significant element of proof of such a violation. See note 8 *supra*.

[21] It is clear that the Court recognized the brokerage reduction in the instant case as the sine qua non of the price reduction—*i.e.*, that these concurrent reductions were not the result of mere chance or accident. However, the Court was equally clear that concurrent price reductions do not automatically compel the conclusion that an allowance in lieu of brokerage has been given. "[W]hether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case." Instant case at 176.

[22] Because the majority made clear that all broker's fee reductions to his own principal would not come within the proscription of § 2(c), the dissent concluded that the majority was blending § 2(a) defenses with § 2(c)'s absolute ban on giving brokerage to buyers. This was, for the dissent, another reason why § 2(c) was inapplicable to the facts of the instant case—*i.e.*, that the per se thrust of § 2(c) had to be blunted in order not to render illegal all brokerage fee reductions. However, the cases the majority envisages falling without § 2(c) are those in which a brokerage fee reduction is based on savings in performing nonbrokerage functions when dealing with a particular buyer. For instance, in the factual context of the instant case, nonbrokerage savings could have been made, justifying some reduction in fee. Defendant Broch regularly charged 5% commission because he performed warehousing services; other brokers for the same seller charged only 4% because they did no warehousing. Obviously, Broch's reducing his fee by only 1% where he performed only a paper transaction could be justified as cost savings in warehousing, and thus not a reduction of brokerage as such. The reduction of fee to 3%, however, was clearly to outstrip his competing brokers and was solely a brokerage

those transactions which are the economic equivalent[23] of payments to the buyer for allegedly performing, or relieving the seller from performing, brokerage services, the Court maintains the section's vitality as a ban on granting discriminatory prices to favored buyers through the mechanism of brokerage.[24] Inasmuch as the broker's fee reductions in the instant case effectively accomplish what section 2(c) has been construed to prohibit in regard to payments to the buyer claimed to be for brokerage, the dissent's objection to the per se consequences of the decision would be better aimed at whether the section should have any per se thrust at all. But the dissent does not so direct its criticism; it in fact avows that section 2(c) should retain its per se attributes wherever applicable.[25] The fallacy in this rea-

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reduction. The Court would not permit brokerage savings alone to justify a discriminatory fee reduction and price discount. See note 16 *supra*. Note that the warehousing which might have justified a 1% fee reduction in the instant case is distinguishable from that "warehousing" in Oliver Bros., Inc. v. FTC, 102 F.2d 763 (4th Cir. 1939), which the buyer allegedly relieved the *seller* of performing. See also FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960), in which retail promotional functions performed by buyer instead of broker, if proved, would have removed the price discount corresponding to a reduction in broker's fee from § 2(c). That the "cost justifications" implicit in the majority decision superficially will look like, but actually be unlike, § 2(a) defenses was recognized prior to the instant case: "One attorney with whom the writer has talked believes that, although cost differences do not make lawful a discount granted in lieu of brokerage, evidence that such differences exist is relevant to a decision whether or not the discount is to be regarded as in lieu of brokerage. He thinks that for this reason data about cost may be offered in a proceeding in which the Commission challenges a discount under the brokerage provision, and may, if adequate, acquit the respondent of the charge. If his opinion is correct, the practical effect is the same as if the cost defense were explicitly allowed, except that the costs offered in justification could not include the savings from avoiding payment of a broker's fee. However, the point has not been tested before the Commission or in the courts." EDWARDS, THE PRICE DISCRIMINATION LAW, 101 n.28 (1959).

[23] In the instant case at 174, the Court stated it saw "no distinction of substance" between the broker paying over part of his commission to the buyer, a clear violation of § 2(c), and Broch's fee reduction passed on to the buyer in the form of a price reduction. A similar observation was made in Oppenheim, *supra* note 11, at 534, in speaking of Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940), where A & P sought to evade § 2(c) by accepting price reductions equivalent to normal brokerage payments: "By characterizing A & P's buying methods as an 'attempted avoidance' the Court served notice that it was piercing words and forms to look at the substance. A similar attitude is detected in the following words of the Commission: 'The supposed distinction between a discount or allowance equivalent to brokerage, made as a part of the price of the goods, and a discount or allowance in lieu of brokerage reflected by the price of goods appears to us too tenuous for approval.'"

[24] Both the majority and dissent invoke legislative history to support their views of § 2(c). The contrary results demonstrate that history's inconclusiveness. An example is the dissent's use of a Senate floor speech saying § 2(c) was not to affect "legitimate" brokerage: the speech was clearly meant to assure the legislators that payments to a broker would not be prohibited—*i.e.*, sellers would be still able to employ brokers; the dissent invokes it to prove that withdrawing some of the broker's pay to give it to a buyer is permitted. Instant case at 182 n.4 (dissent). Both sides of the Court seemingly agree, however, that the basic purposes of the Robinson-Patman Act are to protect little buyers from unfair competition by big buyers. See note 5 *supra*. This purpose prevails even at the expense of certain kinds of seller competition. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 4, 23 (1955) (dissent of Louis B. Schwartz). It is, then, anomalous that the dissent would permit *brokers*, even under an impulse to compete among themselves, to contribute to that unfair buyer competition which is the target of the legislative scheme.

[25] 363 U.S. at 189 (dissent).

soning lies in believing that any cases would arise to which the section could apply if the parties could avoid its consequences merely by grounding price discounts on the broker's making commission reductions or the seller's purporting to eliminate brokerage when dealing with preferred buyers: section 2(c) would bar only transactions in which the parties are so rash as to characterize a discount to a buyer as "brokerage." If the dissent had prevailed in its attempt to separate the elimination and reduction of brokerage fees from section 2(c)'s proscriptions and permit them to be cost justified under section 2(a), section 2(c) would have been left a mere formalism: the result would have been to overrule indirectly the early construction of section 2(c) as a per se section. While this result of the dissent's position would satisfy those who criticize the per se application of section 2(c),[26] as the Court pointed out, "doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve." [27]

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[26] See note 10 *supra*.

[27] Instant case at 177. The paradox, as pointed out by Oppenheim, *supra* note 10, at 535, is that "a manufacturer who sells exclusively through salesmen may pass along to the direct buyer his chief saving in selling cost, namely the cost of the salesmen, while the seller who uses brokers in some transactions is prohibited from passing along his comparable saving in the cost of brokerage on direct sales." It is apparent that a seller dealing through brokers will be at a competitive disadvantage. See 29 GEO. WASH. L. REV. 178, 182-83 (1960). However, it is equally apparent that arguing that this is unfair to such sellers and to brokers, or that it encourages price rigidity is to quarrel with the statute—a quarrel which the Court specifically leaves to Congress.